



## **Case Summary**

Appellant-Defendant Tony L. Ross (“Ross”) appeals his conviction for Operating a Vehicle While Intoxicated as a Class A misdemeanor.<sup>1</sup> We affirm.

## **Issues**

Ross raises six issues, which we reorder and restate as:

- I. Whether the trial court abused its discretion in limiting the time for voir dire questioning to fifteen minutes and denying Ross’s request for additional time;
- II. Whether the trial court abused its discretion by admitting evidence at trial from the traffic stop, in violation of the prohibition of illegal searches and seizures in the Indiana and United States constitutions;
- III. Whether the trial court abused its discretion by admitting evidence of two non-standardized field sobriety tests, the alphabet and backward count tests;
- IV. Whether the trial court abused its discretion by admitting into evidence testimony of Ross’s refusal to take a portable breathalyzer test;
- V. Whether the trial court abused its discretion in excluding testimony by Ross’s wife as to Ross’s normal driving habits, forgetfulness, and ankle pain; and
- VI. Whether there was prosecutorial misconduct during closing arguments.

## **Facts and Procedural History**

In the early morning on July 29, 2004, Officer Ryan Meyer (“Officer Meyer”) of the Carmel City Police Department observed Ross throw a cigarette from his car while both were waiting for a green light so they could proceed onto westbound Interstate 465 from Keystone Avenue. While Ross traversed the entrance ramp, Officer Meyer noticed that Ross’s speed on the ramp seemed markedly slow. Additionally, after both were traveling on Interstate 465, Ross was drifting back and forth in the right-hand lane, described by Officer Meyer as

“a slow jerking back and forth” which prompted Officer Meyer to activate his in-car video camera. Transcript at 199. Shortly thereafter, the passenger side tires of Ross’s car completely crossed over the white fog line at the edge of the roadway. Officer Meyer then activated his emergency lights to initiate a traffic stop.

Ross took an atypically long time to pull over, but eventually did so safely, using his turn signal. Officer Meyer approached the stopped car, informed Ross why he had been stopped, and requested his driver’s license and registration. At this point, Officer Meyer detected the smell of alcohol. Ross admitted that he had been drinking that evening, and that he had consumed the last drink within the previous hour.

While Ross remained in his car, Officer Meyer asked Ross to recite the alphabet from C to N (the “alphabet test”). Ross did so, but continued past N stopping at P. Then Officer Meyer asked Ross to count backwards from 103 to 78 (the “backward count test”). After Ross said 85, he went back up to 86 and then proceeded to count down again. Finally, Officer Meyer asked Ross to count from 1 to 4, touching a finger to his thumb on each count and then to perform it in reverse, repeating the entire process once. In completing the test, Ross touched both his pinkie and ring finger to his thumb at the same time. Based on Ross’s performance, Officer Meyer concluded that Ross had failed each test.

After verifying Ross’s license and registration, Officer Meyer asked Ross to step out of his car to perform the walk-and-turn and one-leg stand standardized sobriety tests. As Ross walked to the back of his car, he had a “slight stumble in his walk,” according to Officer Meyer. Ross failed the walk-and-turn test, because he lost his balance while listening

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<sup>1</sup> Ind. Code § 9-30-5-2(b).

to the instructions, started performing the test before instructed, held his arms out more than six inches away from his body, placed his steps more than one-half of an inch apart, and stopped after turning and had to be instructed to complete the last nine steps. Prior to starting the one-leg stand test, Ross informed Officer Meyer that his left ankle was sprained. However, Ross indicated to Officer Meyer that he could still complete the test. Again, Ross failed the test by using his arms for balance and putting his raised foot down twice during the thirty seconds.

Then, Officer Meyer asked Ross if he was willing to take a portable breath test, but Ross refused, stating that the result would be positive for alcohol. Due to Ross failing all of the administered tests, Officer Meyer concluded that he had probable cause to arrest Ross for operating a vehicle while intoxicated and read Ross the Indiana Implied Consent Law, which requires the officer to offer the suspect a certified chemical breath test. Officer Meyer explained that the test can only be performed at a police facility on a certified instrument overseen by the Department of Toxicology. Ross twice refused to take the certified test. Finally, Ross was placed under arrest.

The State charged Ross with Operating a Vehicle While Intoxicated as a Class A misdemeanor. Ross filed a Motion to Suppress Evidence claiming the traffic stop violated Ross's rights under Article I Sections 11 and 12 of the Indiana Constitution and the Fourth and Fourteenth Amendments to the U.S. Constitution and that testimony about the non-standardized field sobriety tests is inadmissible evidence. After conducting a suppression hearing, the trial court denied the motion as to the traffic stop concluding Officer Meyer did

have reasonable suspicion to pull Ross over. The trial court later denied the second part of the motion prior to trial.

The trial court directed both parties to submit questions to the trial court for voir dire. In conducting voir dire, each side would be allotted two minutes to summarize the facts of the case, followed by an examination of the panel by the trial court, and concluding with each side having fifteen minutes<sup>2</sup> to question the thirteen-member jury panel. Immediately after the trial court provided preliminary instructions and read the oath to the jury panel, Ross provided the trial court with a typed list of forty-three questions for it to pose to the venire. Prior to Ross beginning his allotted voir dire time, he requested additional time, which was denied.

The jury found Ross guilty as charged, and the trial court imposed a one year in jail, with all but six days suspended, one year of probation, a ninety-day license suspension, court costs and a \$143.50 fine, twenty hours of community service, and participation in a victim impact panel, alcohol and drug assessment and treatment. Ross now appeals. Additional facts will be provided as needed.

## **Discussion**

### **I. Time Limit on Voir Dire**

First, Ross asserts that his rights to fundamental fairness, due course of law, and an impartial jury trial were violated when the trial court limited each party's voir dire time to fifteen minutes and denied his request for additional time.

Although trial courts have broad discretionary power in regulating the form and substance of voir dire, Kalady v. State, 462 N.E.2d 1299, 1307 (Ind.1984), the conduct of voir dire examinations is now governed by Indiana Trial Rule 47(D). . . . The decision of the trial court will be reversed upon appeal only if there is a showing of a manifest abuse of discretion and a denial of a fair trial. . . This will usually require a showing by the defendant that he was in some way prejudiced by the voir dire.

Cliver v. State, 666 N.E.2d 59, 65 (Ind. 1994). Trial Rule 47(D) provides “[a]t the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by prospective jurors.”

Ross’s request for additional time was made prior to his questioning of the jury panel and was not accompanied by a showing of good cause. Furthermore, Ross did not renew his request for additional time at the expiration of his time. In his brief, Ross makes no showing of how he was prejudiced by having only fifteen minutes of time for questioning. Without a timely request accompanied by a showing of good cause, Trial Rule 47(D) is not violated. Hence, the trial court did not abuse its discretion by not providing more time for voir dire.

Ross’s brief seems to imply that this time limit was inappropriate because the trial court did not conduct an extensive voir dire based on the forty-three questions he submitted. The submission of these questions occurred minutes prior to the trial court conducting voir dire, providing it with little to no time to review the proposed questions. Due to the untimely submission and plethora of questions, the trial court did not abuse its discretion in conducting

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<sup>2</sup> The Order on Motions In Limine, Instructions, Exhibits, Voir Dire Examination, and Deliberations allotted only thirteen minutes for each side for supplementary questioning of the panel. However, prior to conducting

the voir dire.

## II. Admissibility of Evidence from Traffic Stop

Next, Ross contends that momentarily crossing the fog line without more does not constitute reasonable suspicion justifying a traffic stop and thus the stop by Officer Meyer violates Article I, Section 11 of the Indiana Constitution and the Fourth Amendment to the federal Constitution. Based on this contention, Ross claims the trial court abused its discretion in admitting any evidence produced by the traffic stop. A trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Accordingly, we will only reverse a trial court's ruling on admissibility of evidence when the trial court has abused its discretion. Id. An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and the circumstances before the court. Id.

An investigatory stop of a citizen by a police officer does not violate the Fourth Amendment rights of that individual where the officer has a reasonable articulable suspicion of criminal activity. State v. Ritter, 801 N.E.2d 689, 691 (Ind. Ct. App. 2004), trans. denied. Such reasonable suspicion is determined on a case-by-case basis, in light of the totality of the circumstances. Id. Similarly, under Article 1, Section 11 of the Indiana Constitution, a police stop and brief detention of a motorist is reasonable if the officer reasonably suspects that the motorist is engaged in, or is about to engage in, illegal activity. Id. Thus, the question to be decided is whether Officer Meyer had a reasonable suspicion to stop Ross's vehicle. Although the standard of review of a trial court's decision to admit evidence is

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the voir dire, the trial court informed the parties that each side had fifteen minutes.

whether there was an abuse of discretion, the determination of reasonable suspicion is reviewed *de novo*. Id.

Prior to making the stop, Officer Meyer observed Ross's car: (1) moving atypically slow on an interstate entrance ramp; (2) drifting within the lane with a slow jerking back and forth; and (3) drifting to the right of the fog line. A traffic stop was upheld under similar circumstances in Barrett v. State, 837 N.E.2d 1022 (Ind. Ct. App. 2005), trans. denied. In Barrett, a Meijer employee told police of two people who had just bought precursors for methamphetamine and described their vehicle. Id. at 1024. Once the dispatched officer located the vehicle matching the description, he observed: "(1) the Geo left the designated roadway; (2) the Geo drifted within its lane; and (3) the Geo's passenger-side tires traveled upon the lane marker line." Id. at 1027. Based on these circumstances, the court held that the vehicle was observed driving in a manner that indicated objective signs of driver impairment and provided the officers with a particularized and objective basis for making the traffic stop. Id. at 1028. The totality of circumstances in the case at hand, which almost mirrors the observations of the Geo in Barrett, warrants the same conclusion that Officer Meyer had the requisite reasonable suspicion to stop Ross. Therefore, the trial court did not abuse its discretion by admitting evidence gained as a result of the traffic stop.

### III. Admissibility of Non-Standardized Sobriety Test Evidence

Ross also contends that the testimony about the alphabet and backward count tests is inadmissible due to noncompliance with Ind. Evidence Rules 701 and 702 and that the administration of these tests without the suspect being given Miranda warnings violates the



Fifth Amendment of the federal Constitution.<sup>3</sup> Again, the standard of review for the admissibility of evidence is an abuse of discretion. Washington, 784 N.E.2d at 587.

Smith v. State addressed the admissibility of field sobriety tests in relation to the foundational scientific basis of their reliability as indicators of intoxication as required by Evid. R. 702. Smith held that “the only evidentiary foundation required for the admission of field sobriety test results is that the officer through whom the evidence is offered establish his training and experience in administering such tests.” Smith v. State, 751 N.E.2d 280, 282 (Ind. Ct. App. 2001), trans. denied. The underlying reasoning for this conclusion is that these tests do not involve a complex scientific process or principles. Id. The backward count test had been administered to Smith and is subject to the holding in Smith. Id. at 281. Both the backward count and alphabet test require a person to recite knowledge normally acquired at a very young age. Thus, neither test is scientifically complex, and the only prerequisite to their admission is evidence of the administering officer’s training and experience with those tests. Officer Meyer satisfied this prerequisite by testifying to the training he had received at the Indiana Law Enforcement Academy. Transcript at 163-65.

Ross also challenges the admission of this evidence claiming that according to Penn. v. Muniz, 496 U.S. 582 (1990), the responses are testimonial in nature and such interrogation eliciting such responses without Miranda advisements violates the Fifth Amendment right against self-incrimination. However, the Muniz decision is distinguishable. It was based on

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<sup>3</sup> Ross argues in his brief that the parallel provision in Article I, Section 14 of the Indiana Constitution provides even more protection than its federal counterpart, but does not support this bald assertion with caselaw. Ross only provides a cursory argument for a violation under this constitutional provision and so we only address the argument under the Fifth Amendment.

the finding that the defendant was in police custody at a police station at the time of interrogation. Id. at 590. Miranda safeguards only arise when the suspect is subjected to custodial interrogation. Wright v. State, 766 N.E.2d 1223, 1229 (Ind. Ct. App. 2002). “Absent custodial interrogation, there is no infringement of the Fifth Amendment rights identified in Miranda.” Id. “Ordinarily, persons detained for traffic stops are not in custody for purposes of Miranda.” Lockett v. State, 747 N.E.2d 539, 543 (Ind. 2001). When Officer Meyer requested Ross to perform the preliminary sobriety tests, Ross was still sitting in his car. At this point, Ross was not in police custody and therefore, his Miranda right against self-incrimination had not been triggered. Officer Meyer was not required to recite the Miranda rights prior to administering the preliminary sobriety tests.

Accordingly, the testimonial evidence regarding the alphabet and backward count sobriety tests were admissible, and therefore, the trial court did not abuse its discretion in allowing such testimony.

#### IV. Admissibility of Refusal of Portable Breathalyzer Test

Next, Ross asserts that the trial court abused its discretion in admitting evidence of his refusal to submit to a portable breathalyzer test. Ross admits that he failed to make a contemporaneous objection to Officer Meyer’s testimony regarding this topic, which was the initial admission of evidence regarding the refusal. The failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal. Jackson v. State, 735 N.E.2d 1146, 1152 (Ind. 2000). Thus, Ross did not properly preserve this issue for appellate review and has waived it. Even though Ross later objected to the

admission of the portion of the videotape where Ross refused to take the portable breathalyzer test, this later objection does not preserve the issue for review once pertinent evidence has already been admitted. Ross makes a cursory allegation of fundamental error, but does not develop a supporting argument with citation to relevant authority. Hence, Ross waives review under that doctrine.

#### V. Exclusion of Wife's Proffered Testimony

Fifth, Ross argues that the trial court abused its discretion in excluding testimony by Ross's wife as to Ross's normal driving habits, forgetfulness, and ankle pain. Such a ruling is reviewed for an abuse of discretion. Washington, 784 N.E.2d at 587. In determining the admissibility of evidence, this court will only consider the evidence in favor of the trial court's ruling, along with the unrefuted evidence in the defendant's favor. Brown v. State, 830 N.E.2d 956, 963 (Ind. Ct. App. 2005).

Sonya Ross ("Sonya"), Ross's wife, was prepared to testify to Ross's style of driving when sober and talking on a cell phone and that he was generally forgetful. The trial court sustained both of the State's objections based on relevancy. Ross argues that this testimony is relevant to provide alternate explanations as to why he was drifting within his lane and why he performed poorly on the alphabet and backward count tests.

"Relevant evidence" has been defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ind. Evidence Rule 401.

Sonya's excluded testimony on these two subjects would have been marginally

relevant, at best, in providing alternate reasons for Ross's actions. Moreover, the testimony is not directly probative of Ross's conduct during the traffic stop because it relates to past conduct. Sonya did not observe Ross during the traffic stop, so her testimony to contradict the inference that his actions indicated intoxication is speculative. If Ross intended this testimony to prove his habits, he needed to make a foundational argument under Evid. R. 406. This testimony was properly excluded.

Lastly, Sonya's testimony as to Ross's complaints about his ankle pain on the day of the incident was excluded as inadmissible under Evid. R. 803(3), which provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . ." The proffered testimony was a statement by Ross about his physical condition, the pain related to his ankle injury, and is admissible under Rule 803(3). Therefore, the trial court erred in excluding it. However, Sonya was permitted to testify that Ross had a sprained ankle, which was still swollen on the day of the incident, and that Ross limped. Additionally, Officer Meyer testified that Ross informed him of his sprained ankle prior to completing some of the sobriety tests. An error in the exclusion of evidence is harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights. Washington v. State, 840 N.E.2d 873, 884 (Ind. Ct. App. 2006), trans. denied. The exclusion of this additional testimony about the pain associated with Ross's ankle is sufficiently minor in light of other testimony about the condition of Ross's ankle, to make the error harmless.

## VI. Prosecutorial Misconduct

Finally, Ross contends that prosecutorial misconduct occurred during closing arguments when the prosecutor commented that Ross never changed his mind after refusing to take the chemical breathalyzer test. Ross admits that he did not object to this comment and thus couches his argument in terms of fundamental error.

When reviewing a claim of prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct. Sanders v. State, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000). Then, we determine whether the misconduct placed the defendant in a position of grave peril. Id.

Ross points to this passage from the State's closing arguments as a basis for prosecutorial misconduct:

And remember, I asked Officer Meyer you had 20 or 30 minutes with Mr. Ross in the car on the way, did he offer at any time, did he say, "You know what, I changed my mind. I want to take the test." No, he never did that and I think that is something we can look at.

Ross claims this statement uses Ross's silence against him contravening the holding in Doyle v. Ohio, 426 U.S. 610, 619 (1976). However, Ross's argument is misplaced because the prosecutor's comment in this case did not target Ross's silence but his decision to continue to refuse to take a chemical breathalyzer test. Under Indiana Code § 9-30-6-3(b), a person's refusal to take a chemical test to determine intoxication is admissible as evidence. This portion of the closing argument was just highlighting Ross's continuous refusal to submit to a chemical breathalyzer test. Therefore, the closing statement of the prosecutor does not constitute prosecutorial misconduct.

## **Conclusion**

In conclusion, the trial court did not abuse its discretion in limiting voir dire to fifteen minutes and denying Ross's request for additional time. Nor did Ross demonstrate reversible error in the admissibility of the challenged evidence. Finally, the prosecutor's statement in his closing statement referring to Ross's continued refusal to take a chemical breathalyzer test was not prosecutorial misconduct. Based on the foregoing analysis, we affirm Ross's conviction.

Affirmed.

RILEY, J., and MAY, J., concur.